Against the Grain

Volume 15 | Issue 1 Article 9

February 2003

The Market Power of Publishers

William M. Hannay
Schiff, Hardin & Waite, whannay@schiffhardin.com

Recommended Citation
Hannay, William M. (2003) "The Market Power of Publishers," *Against the Grain*: Vol. 15: Iss. 1, Article 9.
DOI: https://doi.org/10.7771/2380-176X.4243

A Recipe for a Successful . . .
from page 23

retrospective archive is finite, developed to house a set of documents that have been published. Once populated, the archive is considered finished. An example is the **Cavitation 2001** archive at **Caltech**, where documents were produced for the conference proceedings making the archive complete at that time. A current archive is developed to house documents that are currently being produced. These archives include digitally born documents or print converted documents, but the archive is built as documents are being produced. This has the combined effect of producing archives that are initially small but are relatively current. A mixed retrospective and current digital archive includes items that were previously published but also those items that are being produced currently. This provides a collection that spans a number of years, making it more likely to be used, but also presents some difficulties with populating the archive with disparate document types. Most archives at **Caltech** are mixed retrospective and current archives. I expect that most digital archives in the future will include items retrospectively scanned or converted plus newly produced items.

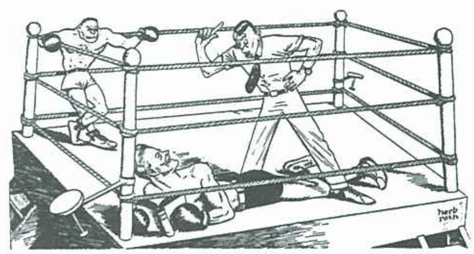
Additional considerations should be given to other issues in collection development as they relate to digital archives. These issues include continuing economic commitment to the collections, the costs associated with processing and adding material to the archive, the comprehensiveness of the collection, the uniqueness of the material, and physical and bibliographic access to the material. All of these issues impact collection development in the print libraries and archives and will affect digital archives in the future.

Most importantly, to maximize the effect of digital archives, we must not only identify the material that is most valuable to the defined user community and seek that material for our collections, but also promote and publicize that content. Participating in federated searching as an OAI data provider is the first step in getting the archive indexed and accessible by end-users. In addition, archives should be spidered by major search engines, publicized in library and subject specific publications and listservs, and otherwise promoted in any way.

As libraries build and promote digital collections, we must follow and build upon the principles of collection development that have been established for the print world and for the archival world. If we build high demand, high quality collections at a reasonable cost that can be maintained for the long term, we will take the first steps to becoming a major part of the scholarly research dissemination chain.

The Market Power of Publishers

by **William M. Hannay** (Attorney, Schiff, Hardin & Waite,
7200 Sears Tower, 233 S. Wacker Drive, Chicago, IL 60606-6437)
<whannay@schiffhardin.com>



A Presentation to the Charleston Conference

A good deal of concern has been expressed in library circles in the past few years about the growing market power of publishers, particularly commercial publishers of scientific, technical, and medicals serials and journals. The existence of this market power is seen in significant subscription price increases and in the bundling of journal subscriptions.

As an example of real world market power in academic publishing, here's a quote from the May 12, 2001 issue of *The Economist*: "if a company owns a must-read title in say, vibrational spectroscopy, it has a nice little captive market."

A fair question to ask is, "what is market power?" and in turn, "do publishers have market power?" From the perspective of antitrust law, "Market power . . . is the ability profitably to maintain prices above competitive levels for a significant period of time. [T]he result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources." This widely-accepted definition appears in the *Horizontal Merger Guidelines*, jointly issued in 1992 by the **U.S. Department of Justice** and the **Federal Trade Commission**. The Guidelines go on to note that market power can lead to effects beyond price. "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation."

In order to understand the application of this definition, let us ask whether hypothetical Publisher XYZ has "market power." Let us assume that Publisher XYZ has only one journal focusing on the subject of, say, brain lesions in rats. Further assume that no one else publishes such a journal. Query whether, at this point, we know enough to answer the market power question. The answer is actually no. Answering the market power question just isn't that easy.

To assess the presence or absence of market power, there is a variety of other data that one needs to know. For example, one needs to ask what, if any, leverage XYZ's customers have in the market. How "elastic" is the demand? To judge the elasticity of demand, we need to ask whether libraries just have to have it. Will they pay largely any price to get it? Put differently, how special is this rat brain lesion journal? Could a competing journal enter the market? Would new entry be easy or hard?

In addition to these fundamental sorts of questions, what else affects market power?

What if Publisher XYZ has 100 titles or 1,000? Is its market power over the hypothetical rat brain lesion journal any greater? And what if Publisher XYZ merges with one, two, or ten other publishers? Is its market power greater? Has the possibility of market entry by a competitor been reduced? Eliminated? These are complex and thought-provoking questions, but perhaps we can learn something from a recent case which analyzed market power issues in the context of the 2001 acquisition of **Harcourt General Inc.** by **Reed Elsevier PLC** under the antitrust laws of Great Britain.

As required by those laws, the proposed acquisition was notified to the British authorities and, in turn, referred to the **U.K. Competition Commission** for investigation on February 21, 2001. As part of that investigation, a "Statement of Issues" was sent to the parties by the **Commission** on March 19, 2001. In U.K. practice, a "Statement of Issues" is similar to a subpoena or civil investigative demand in the United States, requiring the parties to submit detailed answers and/or related documents to a government agency. The contents of that "Statement of Issues" bear some consideration in detail as an illustration of how an antitrust regulator examines the market power issue in the context of publishing.

The investigations focus on the parties' business was narrow, because the regulator concluded early on that "the only parts of their businesses with potential to give rise to competition concerns were sales of STM journals, in both printed and electronic formats, in the U.K." (Press Release P/2001/351, 5 July 2001, "UK Competition Commission's Investigation Clears Reed Elsevier/Harcourt General Merger").

Under U.K. antitrust law, a merger is illegal if it will operate, or may be expected to operate, against the public interest, taking into account the following factors:

— Will the merger maintain or promote effective competition?

— Will the merger promote consumers interests re: price, quality, and variety of the goods or services supplied?

— Will the merger promote cost reduction and product innovation?

continued on page 26

The Market Power of Publishers
from page 24

— Will the merger maintain or promote the balanced distribution of industry and employment in the U.K.?

— Will the merger maintain or promote competitive activity in overseas markets on the part of U.K. producers and suppliers?

See Section 84 of the Fair Trading Act of 1973.

(It should be noted that the U.K.'s antitrust standard for merger review is worded differently than that of the United States, but would not necessarily lead to a different result. In America, Section 7 of the Clayton Act prohibits mergers and the acquisitions of stock or assets that "may substantially lessen competition" or tend to create a monopoly in any line of commerce. Government enforcement of Section 7 is facilitated by the pre-merger notification requirements of the Hart-Scott-Rodino Act.)

Turning to the **U.K. Competition Commission's Statement of Issues** in the **Reed Elsevier-Harcourt** acquisition, the **Commission** first sought information about the nature and scope of the market itself. The **Commission** asked:

— Is there a single market for all types of STM journals or separate markets for journals relating to separate academic disciplines within STM?

— Are journals produced by commercial publishers in a separate market from those produced by non-commercial or learned societies?

— Do individual journals constitute distinct markets in themselves?

The **Commission's Statement of Issues** also sought to probe what the principal effects of the acquisition were likely to be, asking:

— Will it lead to a significant rise in prices, discontinuing of titles, or reduction in quality, choice or levels of service?

— Will it lead to an increase in the proportion of the most frequently cited journals coming under the control of **Reed Elsevier**?

— Will returns accruing to **Reed Elsevier** increase as a result of the proposed merger?

— Are other suppliers of STM journals or other publications in the U.K. likely to be weakened?

In its **Statement of Issues**, the **U.K. Competition Commission** also inquired into the potential side effects of the transaction, asking whether the merger allowed or exacerbated anti-competitive practices, such as tying in authors by exclusive contracts, excessive pricing, publishers forcing portfolios of journals onto customers, publishers failing to supply back numbers, or one publisher attempting to preclude other publisher's titles from the STM market.

Finally, the **Commission's Statement of Issues** probed the existence and strength of what may be called "buyer power," asking:

Will adverse consequences be constrained by:

— customers having sufficient buyer power?

— their being able to organize themselves to create sufficient buyer power?

— their ability to find alternative titles or services in the U.K. or abroad?

— greater recourse to the use of inter-library lending? or

— greater exploitation of alternative methods of disseminating the fruits of academic research, such as publishing on the Internet?

Based upon the information that it obtained during its investigation of the proposed acquisition, the **U.K. Competition Commission** issued a ruling on July 5, 2001, allowing the transaction to be completed. (The United States antitrust enforcement agency, the **Department of Justice**, had earlier decided — without issuing a report or other explanation — to take no action with respect to the acquisition.) The three main findings of the U.K.'s lengthy report were as follows:

(1) The **Commission** found that the rate of change in the provision of electronic access to STM journal content was so rapid and the nature of current arrangements with customers was so fluid that there was, at present, insufficient experience to provide evidence that the merger would be likely to increase the pricing of access to **Reed Elsevier's** electronic services.

(2) With regard to linkages with other electronic platforms, the **Commission** received no evidence that **Reed Elsevier** had denied competitors links with its **Science Direct** platform, despite its already very strong position in electronic publishing. The **Commission** did not have an expectation that the addition of Harcourt's journal titles to **Reed Elsevier's** portfolio would lead to any adverse changes in behavior in this area.

(3) On pricing, **Reed Elsevier** pledged that its existing commitment to hold average increases in annual subscription rates to below 10 per cent would be extended to cover all the **Harcourt** journal titles acquired under the proposed merger, leading to a reduction in their current rate of annual price increases. As **Reed Elsevier** was not the only STM publisher that charged high prices, the **Commission** did not consider that it was likely to raise the price of **Harcourt's** journals more steeply than any other potential acquirer if the proposed merger did not take place.

Although the **Commission** did not make any adverse findings in its July 5th report, it did comment that some aspects of the STM market raised concerns, and it invited the **Director General of Fair Trading (DGFT)** to consider whether a wider review of the market was necessary.

Following up on the **Competition Commission's** suggestion, an informal consultation was carried out by the **U.K.'s Office of Fair Trade** on the market for scientific, technical and medical journals. On Sept. 9, 2002, the **Office** issued a report noting some "serious concerns," but also noting countervailing economic forces that indicated no action needed to be taken by the government.

The **Office of Fair Trade** (which is the U.K. agency most similar to the U.S. **Department of Justice's Antitrust Division**) had "serious concerns" about certain aspects of the STM market, particularly:

— Price increases above inflation.

— Substantial price disparity between commercial journals and non-commercial journals.

— High levels of profitability for commercial STM publishing (around 10-15% above other forms of commercial journal publishing).

— Bundling of a large selection of their journals by commercial publishers possibly hindering others from entering the market.

At the same time, however, the **OFT** also saw several emerging economic forces that had a countervailing effect:

— Price restraint by commercial publishers.

— Increased buying power stemming from the emergence of electronic journals and articles on the Internet (allowing bypass of commercial publishers)

— The power of academics (as authors) who are motivated to publish in prestigious journals but also to ensure that their articles are available to a wide audience through low priced journals with liberal distribution rights.

The **Office of Fair Trade** explained its views as follows:

> Journals are the principal means by which scientific knowledge is disseminated. The market, which operates worldwide, has a number of features that suggest that competition may not be working effectively. However, market forces harnessing new technology may change this without the need for intervention. (OFT 9/9/02 Report)

But, if competition in the STM market fails to improve, the **OFT** warned, it may consider further action and consider, due to the global nature of the market, whether such action could be conducted internationally.

In the absence of any written analysis of the **Reed Elsevier - Harcourt** acquisition or, more broadly, the academic journal market by the United States antitrust agency, the only authoritative, recent studies are those by the **U.K. Competition Commission** and the **OFT**. The natural question is whether the Brits are right or wrong? Is it true that "market forces [are] harnessing new technology" in a way that will make competition work more effectively in the future?

Consider the following judgment from a **Morgan Stanley Equity Research** report dated just a few weeks ago (September 27, 2002):

continued on page 28

The Market Power of Publishers
from page 26

"The nature of the [scientific publishing] industry is highly unlikely to change." This **Morgan Stanley Equity Research** report — which relates to the merits of investing in Reed Elsevier stock — goes on to state that, "The nature of the scientific publishing industry will not change any time soon, in our view, despite the attempts of organizations such as **SPARC** to encourage academics to publish their research directly on the internet and to encourage the boards of individual journals to defect from commercial publishers to not-for-profit publishers. Libraries and academics have been trying for over a decade to develop new ways of spreading academic knowledge and research, but the barriers to entry the incumbent journals enjoy are just too high (loyal readership, brand recognition, boards of academics) and the value proposition are just too high (they bring order to an anarchic process, the development of knowledge).

So, are the Brits right or is **Morgan Stanley**? Will the nature of scientific publishing change in a fundamental way and in a fast enough timeframe to assure that market power cannot be exercised in a way that will operate against the public interest? You be the judge.

But wait! Don't answer that question yet! Here's a late breaking development. On October 18, 2002, **Wolters Kluwer** agreed to sell its academic publishing unit to private equity companies **Candover** and **Cinven** for 600 million euros. You may not be familiar with the names of these two companies, but they are no strangers to the publishing world. **Cinven** acquired **Vivendi Universal Publishing** in April 2002 and once owned **Routledge**, which was subsequently acquired by **Taylor and Francis**. **Cinven** is also invested in **Newsquest** and **IPC Media**. **Candover** has investments in British publishers **Regional Independent Media**, **Midland Independent Media**, **Centaur Publications** and book publisher **Orion**.

So, as long as we are talking about publishing companies, let's ask what impact this deal might have. The current head of **Kluwer Academic Publishers**, **Peter Hendriks**, is quoted as saying, "It is our intention to maintain the pre-eminent status of our publications by continuing to pay close attention to meeting the needs of our authors, librarians, and readers and ensuring our on-line delivery platform is reliable."

What do the other new owners say? "**KAP** is a high-quality business operating in a niche sector with high barriers to entry," **Candover** director **Simon Leefe** said. "The scientific, technical and medical information publishing industry enjoys sustainable growth throughout the economic cycle, and we are backing a management team with solid plans for both revenue and margin growth."

How will this "revenue and margin growth" occur? **The Financial Times of London** reports in an October 19, 2002 edition, "The deal raised expectations that **Candover** and **Cinven** would create a dedicated scientific publishing business, possibly involving a separate bid for **BertelsmannSpringer**, the scientific arm of the **Bertelsmann** media group." If so, the acquisition might increase **Kluwer's** market power. Or maybe not.

Based on the definition of "market power" and the analysis we have seen used by the U.K. antitrust authorities, do publishers have market power? All 2,048 of them? (The **Morgan Stanley** report lists the top 20 publishers and notes that there are another 2,028 entities that publish one or two journals each.) Just the top 20? 10? 5? And how about that rat brain lesion journal?

If the Brits are right that there are (or soon will be) effective constraints on publisher market power, then the competitive process should sort itself out in the mid to long run. But if the **Morgan Stanley** report is right (*i.e.,* "The nature of the scientific publishing industry will not change any time soon)," the "serious concerns" noted by the **U.K.'s Office of Fair Trade** will likely continue indefinitely.

Why is there such a discrepancy? Why does the U.K. enforcement agency see beneficial effects from **SPARC** and similar projects that are wholly discounted by **Morgan Stanley**? Perhaps the **U.K. Office of Fair Trade** sent someone to attend the **United Kingdom Serial Group's 25th Annual Conference and Exhibition** in mid-April of this year. A report on that conference (published in the October issue of ***The Charleston Advisor***) says that a representative of **SPARC** made a presentation about the group's efforts and indicated that it was "taking credit for stemming price increases for *Tetrahedron Letters*, thanks to its competitive efforts."

You be the judge.

Uptight In Library Land: A Confirmation of Stress In South Carolina Academic Libraries

by **Edwin O. Merwin, Jr.** (USC-Salkahatchie; Phone: 843-549-6314 x.327) <emerwin@gwm.sc.edu>

One does not have to be a lion tamer, frontline soldier, or law enforcement officer to encounter stress while on the job, and my research — along with 29 years' experience — shows that librarians have their share of work related stress. A perusal of library literature does not offer much help. Apparently this topic is not widely discussed, at least in print. A recent work on the subject actually ranks our profession as one of the most stress-free, i.e., number seven from the bottom, out of a possible 250 (Krantz 1999). While a *little bit* of stress can be productive, the question of when a person's stress level moves from help to hindrance can be crucial to the success of the organization of which that person is a part.

Stress may be defined as "our response to events that disrupt, or threaten to disrupt, our physical or psychological functioning" (Baron 97). **Charles Bunge** defines stress as:

> "...a person's physiological and psychological reaction to a challenge or demand that is placed upon him or her...For most people most of the time, our reactions to challenges and demands are part of the joy and verve of our lives...To the extent that our reactions to challenges and demands are continually or severely painful, we can say that we have 'distress', 'strain', or stress as it is commonly understood" (Bunge 87).

With this in mind, one might ask where and how the residents of library land experience such "disruption."

To address this question I conducted a survey entitled "Librarians and Stress." I mailed the following document, along with a stamped, self-addressed envelope, to 35 academic librarians in South Carolina. On several questions I asked participants to check all that applied, with the result that percentages do not always add up to 100%. The response rate, or number of items returned, was 94%.

1. My job is (please check one):
   Head Librarian___
   Circulation Librarian___
   Reference Librarian___
   ILL Librarian___ Other___
2. Do I ever feel stressed while at work:
   Yes___ No___

continued on page 30